SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM [redacted] 1969

No. [redacted] 235

RICARDO PEREZ GOITIA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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IN THE

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No.

RICARDO PEREZ GOITIA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Ricardo Perez Goitia, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered against him in the above-entitled case on October 6, 1967, upon which Petitioner was sentenced on February 23, 1968 to 30 years imprisonment.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on April 15, 1969. Mr. Justice Abe Fortas, on May 5, 1969 granted an order extending the time to file a Petition for a Writ of Certiorari to and including June 15, 1969.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, U.S.C., Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the First Circuit.

C. Questions Presented

The questions specifically presented are:

1. Whether or not the direction of the Trial Judge to try the Petitioner in absentia following his non-appearance after the selection of the jury did not, under all the circumstances, violate the Petitioner's rights to due process under the Fifth Amendment and his right to counsel under the Sixth Amendment.
2. Whether or not the direction of the Trial Judge to proceed with the trial in absentia was not an abuse of discretion which amounts to reversible error under all the circumstances.
3. Whether or not the Trial that actually took place did not deprive the Petitioner of due process of law under the Fifth Amendment and the right to counsel under the Sixth Amendment.
4. Whether or not three separate references by the United States Attorney in a two-paragraph summation to the uncontradicted nature of the proof did not, under all the circumstances, constitute reversible error.

D. The Statutes and Rules

The statutes involved are: United States Code, Title 21, Sections 171, 173, 174; United States Code, Title 26, Sections 4704(a), 4705(a), 7237(a) as amended, 7701(c).

The principle rule involved is Rule 43 of the Federal Rules of Criminal Procedure.

E. Statement of Matters Involved

The petitioner was indicted and charged with a violation of the statutory provisions set forth above. The charges arose out of the Petitioner's alleged receipt and possession of narcotic drugs. Following his trial in absentia, Petitioner was sentenced to thirty (30) years in jail.

The trial below must be one of the most extraordinary in the annals of American jurisprudence. Following the selection of a jury, in which the Petitioner's then retained counsel did not participate because of the claim that they were not prepared (A 3, 4, 20, 21, 30), the matter was adjourned for several days, apparently for the purpose of preparation (A 26). On the date that was fixed, Petitioner did not appear in Court (A 37). One of his previously-retained counsel, Benicio Sanchez Castano, was ill and did not appear in Court either. The second previously-retained counsel, Cesar Andreu Ribas, informed the Court that the Petitioner told him that he (Mr. Andreu) was not his lawyer and that Mr. Sanchez was Petitioner's lawyer (A 38) and that he could "not fulfill my duty" (A 57). On the following day, Mr. Andreu stated that "I am not going to question, because I am not acquainted with this defense", and "I don't want to do anything because he repudiated me" (A 62).

The Trial Court was moved by these statements to assign a second lawyer to "assist" counsel. It was clear that the second lawyer had never spoken one word to the Petitioner before undertaking his duties.

Finally, before the evidence was presented, Mr. Andreu described the Petitioner as "a very violent man" who had insulted him and indicated fear for his personal safety if the Petitioner believed "that I am participating in something that might put him in jail" (A 151).

ONE

The direction of the Trial Court to try the petitioner in absentia under the circumstances present violated his constitutional rights to due process under the Fifth Amendment and his right to counsel under the Sixth Amendment. At the very least, it was an abuse of discretion, constituting reversible error.

The circumstances preceding the Trial Court's direction to proceed with the trial in absentia can be set forth concisely.

The Petitioner was arrested on July 18, 1967, indicted on August 7, 1967, and given until September 11, 1967 to file motions. On October 2nd, the Petitioner's then trial attorney, Mr. Benicio F. Sanchez Castano moved for a continuance asserting that he had filed a demand for a Bill of Particulars on September 11th, had received an incomplete answer on September 29th, and therefore had been unable to conduct a meaningful investigation. Counsel further stated that preparation for trial had been handicapped because the Petitioner had been unavailable to confer with

counsel because of the serious illness of his infant son (A 2-4).

Denying all motions and rebuking the Petitioner's attorneys for requesting a continuance, the Court directed the immediate impanelling of a jury with the trial to proceed on the following day (A 9).

Motions by counsel to withdraw were denied and jurors were called and duly sworn (A 9). Counsel refeused to make any challenges to the jury or to participate in the proceedings because they were not ready to try the case (A 20).

During an accompanying colloquy the Court sharply rebuked counsel and threatened them with contempt of Court and possible disbarment (A 20, 21).

Mr. Sanchez responded in essence that "it is impossible for me to discharge my duties" (A 24). Mr. Andreu expressing concern about "antagonizing" the Court (A 22), said he would participate to "the extent where I am prepared to do so" (A 22), but that he was not prepared to participate in "the challenging of the jury" (A 22).

Again, Mr. Andreu repeated the limited nature of his participation—"that if I know of something that may come up during the testimony of a certain witness that I think I can challenge—I will do that" (A 23).

The Court directed that the jury be impanelled and counsel did not participate (A 30).

On October 5, 1967, neither the Petitioner nor Mr. Sanchez appeared in Court. Mr. Andreu appeared and informed the Trial Judge that the Petitioner had sought to speak to the Judge personally and told him that Mr. Sanchez was the

Petitioner's only attorney. Sanchez, it developed, was ill at home (A 37).

After revoking bail and issuing a bench warrant, the Court set the trial down for October 6th at which time the Petitioner again was not present. The Court affirmed that it would proceed to trial pursuant to Rule 43 of the F.R.C.P. (A 152).

Mr. Andreu informed the Court that he would offer no defense for the Petitioner, and would not question any witness, since he was unacquainted with the Petitioner's defense. Andreu also said "I don't want to do anything because he repudiated me" (A 62). Amazingly, the Trial Court accepted this as a satisfactory arrangement, blaming the absent defendant (A 63).

Finally, as noted earlier, Mr. Andreu described the Petitioner as a "very violent man" and "I don't want to just make him believe that I am participating in something that might put him in jail" (A 151).

The following trial took some 27 pages of the record and involved only one substantive witness, a special agent of the Internal Revenue Service.

While we submit that Rule 43 of the Federal Rules of Criminal Procedure is unconstitutional on its face and should be so adjudicated by this Court, we do not think that that issue needs to be reached on the facts presented. We submit that the application of Rule 43 in the case below constituted a plain violation of the Fifth and Sixth Amendments to the Constitution of the United States.

Surely, it can be assumed that a trial in absentia is repugnant to the basic sense of fair play that underlies the Con-

stitution of the United States and in particular the due process provisions of the Fifth Amendment. Rule 43 clearly reflects a judgment that there are circumstances in which other values justify such a trial. The principal justification appears to be the view that a defendant ought not be permitted to flout the normal processes of law and paralyze judicial proceedings by absenting himself once a trial has been commenced. (See *Falk* v. *United States,* 15 U.S. App. P.C. 446 [1899] Cert. denied 181 U.S. 618 [1901]). We do not believe that the policy grounds underlying Rule 43 could possibly justify proceeding with a trial in absentia under the circumstances that were present in this case.

The only event that occurred prior to the defendant absenting himself was the selection of the jury in which his ten-counsel refused to participate because they were allegedly not ready. Surely, that investment of judicial time was not so immense as to render a delay an appalling burden upon the processes of the Court.

The trial which was to take place and that did take place was an exceedingly brief one. This was not an occasion in which many witnesses had been routed out of their normal pursuits to be made available for a trial of complexity and length. Only one substantive witness testified. Surely, the burden on the Government in securing the presence of that witness was not an onerous one or one that required the vindication of our judicial system by proceeding to trial in the absence of the Petitioner.

What harm indeed would have occurred if this exceedingly brief trial were deferred until the apprehension of the Petitioner?

What injury would have befallen our judicial processes?

Moreover, the trial court was put on notice that grave questions in regard to counsel existed independently of the Petitioner's absence and that proceeding to trial in his absence would complicate and aggravate those questions. The Trial Court was on notice that the one attorney present had been dismissed by the Petitioner and felt himself wholly unprepared to try the case. More compelling than that, the attorney stated that he had been "insulted here in the corridor" by the Petitioner, "and I would prefer that you designate Mr. Feldstein and relieve me of that because this is a very violent man and I do not want to just make him believe that I am participating in something that might put him in jail" (A 151). Further, Mr. Andreu requested the Court to inform the Petitioner upon his apprehension that Mr. Andreu did not want to participate and had been directed to do so. The Court assured the apprehensive attorney that he would at the appropriate occasion so inform the Petitioner (A 151).

Surely it is an extraordinary thing to proceed with a trial in absentia of a defendant represented by an attorney who had been "repudiated" by the absent defendant, who had been "insulted" by the absent defendant, and who was in actual physical fear of the defendant. Apart from the actual fear of the defendant, the statement of counsel to the Trial Court that the Petitioner was a "very violent man", and the expression of his personal fear, by itself established a psychological frameword in which the trial ought never to have taken place.

In the light of these factors as well as those mentioned earlier, we submit that the Court's direction to proceed with the trial of the Petitioner in absentia grievously violated his rights under the Fifth and Sixth Amendments.

In addition to the foregoing the direction of the Court to proceed with the trial after only one day's absence by the defendant, itself raises the gravest questions as to the Court's exercise of discretion. See *Phillips* v. *United States*, 334 F.2d 589 (9th Cir. 1964).

If this Court should conclude that the events here did not violate the constitutional rights of the Petitioner as claimed, we submit that at the very least a grave abuse of judicial discretion was presented below that should independently require the setting aside of the conviction.

TWO

The actual conduct of the trial below violated the petitioner's rights under the Fifth and Sixth Amendments to the Constitution.

The most striking aspect of the very brief trial below is that neither of Petitioner's counsel, either the ones originally retained nor the one assigned by the Trial Court, uttered one solitary word in behalf of the Petitioner by way of question, objected, motion or argument. Their sole function at the trial was to stipulate to the testimony of technical witnesses and to state that there was no objection to the exhibits.

It would surely be clear that if this legal performance were attributable to incompetence, inexperience, stage fright, or some mental or physical disability that the conviction below could not stand. See *MacKenna* v. *Ellis*, 280 F.2d 592 (5th Cir. 1960). We know of no standard of performance that would sustain as an effective representation by counsel that which occurred below.

Obviously the only way in which the representation below could be justified as sufficient would be a determination that it represented a purposeful legal strategy under the circumstances that existed. No such justification is available on the record below. It is obvious that a major factor in the position taken by counsel was fear for his personal safety, if he should in fact participate in the trial. Whatever the basis for that fear may have been, we think it clear that a decision not to do anything on behalf of a client by a lawyer because the lawyer is afraid for himself cannot justify the total non-performance by counsel that took place below.

The Trial Court was not taken by surprise by that which occurred.

Counsel had explicitly put them on notice both as to his intention, his lack of preparation and his personal fear. At the very least one would assume that some judicial effort should have been made to probe counsel as to the nature and extent of his fear and the potential that it had for affecting the making of decisions in a case that involved the kind of penalty that was imposed below.

We do not think it an exaggeration to say that a trial of a man in absentia in which he is represented by counsel who are in fear of him and who say not one word on his behalf cannot be reconciled with the Fifth and Sixth Amendments to the Constitution of the United States.

THREE

Reversible error was committed when without correction from the Trial Court, the United States Attorney in a summation of two paragraphs made three unmistakable references to the defendant's failure to testify.

The summation of the United States Attorney was extremely brief and it is perhaps appropriate at this point to quote it in full:

> "Mr. Figueroa: May it please the Court. Members of the jury. I shall be brief because the evidence was b..ef. I promised I would prove beyond a reasonable doubt that on May 27, 1967 and in Carolina, Puerto Rico, the defendant Ricardo Perez Goitia sold to a special employee of the narcotics bureau of Puerto Rico three ounces of Heroin, a narcotic drug, known as Heroin, for the amount of $3,600. You have heard the testimony of the Government, the only evidence before you.
>
> Fortunato Jorge has proved the case beyond a reasonable doubt. I don't think I should argue any more. There should be no doubt as to the Government's having proved beyond a reasonable doubt the three counts. Ricardo Perez Goitia, according to the testimony, had in his possession the narcotic drug, Ricardo Perez Goitia sold the narcotic drug to the special employee. There is no other testimony to the contrary. The only evidence you have is the testimony of Fortunato Jorge, which has not been impeached or cross-examined by the attorney for the defense.
>
> With that in mind, I ask you to bring a verdict of guilty as charged in the three counts." (A 76-77)

It will be observed that in this exceedingly brief summation the principle theme was that the evidence presented by the United States had not been contradicted. Thus, reference was made to "the only evidence before you", "there is not other testimony to the contrary", and "the only evidence you have".

In the light of the particular circumstances of the representation in the trial, it is perhaps an aggravating feature that the United States Attorney did not hesitate to refer to counsel's failure to impeach or cross-examine the principal Government witness.

In the opinion of the Circuit Court, it was acknowledged that "part of this was quite improper." (P. 7). In view of the fact that the petitioner was absent during the trial, the multiple references to the uncontradicted nature of the case were more pervasively prejudicial than in any case in which the question has arisen. Not only did the stress on the "uncontradicted" nature of the case plainly invite the jury's attention to the defendant's failure to testify in regard to matters that he alone could contradict, but it inevitably excited the jury's attention to the sinister significance of the non-appearance of the defendant. Cf. *Griffin* v. *California,* 380 U.S. 609 (1965).

The Circuit Court plainly undertook to sustain that which occurred by the hypothesis that no objection had been made by counsel to the improper remarks of the United States Attorney. Thus, it invited a comparison of *Holden* v. *United States,* 388 F.2d 240 (1st Cir. 1968), Cert. denied 393 U. S. 864, in which a conviction was sustained in the absence of a prompt objection, with *Desmond* v. *United States,* 345 F.2d 225 (1st Cir. 1965), in which a conviction

was reversed when an objection had been made and overruled even though the Court had made an appropriate instruction in the course of its charge.

Surely, in the light of the circumstances surrounding counsel in this case, the attempt to sustain the admittedly erroneous remarks of the U. S. Attorney on the thesis that counsel had not objected is utterly untenable. Counsel had objected to nothing in the trial. Counsel had conducted the trial after informing the trial judge that he was in personal fear of the defendant. It is surely extraordinary to conclude that the failure to object by an attorney operating under these conditions, in the absence of the defendant, forfeits the defendant's rights. In the light of the fact that the trial proceeded in the absence of the defendant and that by the time the summation was uttered counsel had established a complete record of non-participation, it was plainly the obligation of the Trial Court immediately to rectify a two-paragraph summation which contained three plain references to the failure of the defendant to testify, and by inference, to his failure to appear.

We respectfully submit that these prejudicial observations by the United States Attorney in his summation by itself constitutes reversible error and requires a setting aside of the conviction.

CONCLUSION

For the reasons here and above set forth, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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LEONARD SANDLER,
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7106.

RICARDO PEREZ GOITIA,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, *Chief Judge,*
MCENTEE *and* COFFIN, *Circuit Judges.*

Albert J. Krieger, with whom *Benicio Sanchez Castano* was on brief, for appellant.

Thomas O'Leary, Attorney, Department of Justice, with whom *Fred M. Vinson, Jr.,* Assistant Attorney General, and *Francisco A. Gil, Jr.,* United States Attorney, were on brief, for appellee.

April 15, 1969.

MCENTEE, *Circuit Judge.* Defendant was charged in a three count indictment with violation of the narcotics laws. The case went to trial on October 2, 1967,[1] on which date he

[1] All dates hereinafter mentioned refer to the year 1967.

appeared in court with counsel. After the trial had commenced, defendant jumped bail and absconded.[2] Invoking Fed. R. Crim. P. 43,[3] the district court ordered the trial to continue without him. The jury returned a verdict of guilty on all three counts.[4] In this appeal defendant contends principally that the district court abused its discretion in resorting to trial in absentia; that he was not effectively represented by counsel and further, that reversible error was committed in the presentation of the government's case.

In view of the issues raised we think it necessary to recite the facts in some detail. Shortly after his arrest on July 17, defendant was brought before a United States Commissioner. He was represented by Attorney Cesar Andreu Ribas, who obtained his release on bail. On August 7 the indictment was filed and four days later, at Attorney Andreu's request, the arraignment was continued to August 21 and the defendant was granted permission to travel to the Dominican Republic to get his family. On August 21 the defendant, now represented by Benicio Sanchez Castano in addition to Andreu, pleaded not guilty to the indictment, was released on bail and the case was set for trial on September 18. At his attorneys' request, defendant's trial was later continued to October 2.

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[2] After an extended odyssey, he was finally apprehended in New York City on November 30.

[3] "In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict . . ." The death penalty is not involved in this case.

[4] Thereafter defendant was sentenced to concurrent thirty year terms and non-cumulative $10,000 fines.

Appendix A—Opinion of United States Court of Appeals, First Circuit

On September 11 defendant's attorneys moved for another continuance and also for a bill of particulars. The government filed its bill of particulars on September 28, but no disposition was made of the motion for a continuance. On October 2, the day set for trial, defendant through his attorneys, moved to dismiss the indictment for want of jurisdiction. Counsel also requested a further continuance on the ground that the government's incomplete bill of particulars made proper investigation of the case impossible and that due to the illness of the defendant's son, counsel had no chance to confer with their client. After both of these motions were denied Sanchez and Andreu asked the court's permission to withdraw as defense counsel which request was denied.

The court then proceeded to impanel a jury in which undertaking it got little, if any, cooperation from the defendant's attorneys. In fact the defense declined to exercise any challenges despite repeated opportunities given to it by the court to do so, a course of conduct in which the defendant himself acquiesced. After the jury was finally impanelled, the district court continued the trial to October 5 to give defense counsel more time for preparation and, as the court frankly acknowledged, to avoid a collision over what amounted to refusal by counsel to proceed with trial on October 2.

On October 5 the court and jury gathered at the appointed time, but Attorney Andreu was late, Attorney Sanchez was at home ill, and the defendant did not appear at all. After further delays during which the court established that the defendant had voluntarily absented himself, the trial was

resumed the following evening (October 6) at 8 p.m. Attorney Sanchez was not on hand and Attorney Andreu was reluctant to proceed, saying that the defendant no longer desired his services. After expressing confidence in Andreu, the court appointed yet another attorney, Stanley Feldstein, to assist him.

The trial itself was very brief and the participation of defense counsel perfunctory, to say the least. The prosecutor made a brief opening statement, presented stipulations as to testimony by two government witnesses on somewhat formal matters;[5] and then called a government agent named Fortunato Jorge, who testified on the substance of the government's case. The prosecutor's summation followed. Defense counsel made no statement to the jury, presented no evidence and did not cross-examine Jorge (although the court itself asked him certain clarifying questions). In the face of such a recital it would require a strong portion of ingenuity to suggest that the court had been less than fair to this defendant.

It is not disputed that if, after the beginning of trial in noncapital cases the defendant voluntarily absents himself, the trial may continue in his absence. *Diaz* v. *United States,* 223 U.S. 442 (1912); *Cureton* v. *United States,* 396 F.2d 671 (D.C. Cir. 1968); Fed. R. Crim. P. 43. Nor is it disputed that in this case the trial had begun, the jury having already been impanelled. *Diaz, supra, at* 455. Defendant contends that the propriety of trial in absentia must be judged

[5] The first was testimony by a chemist that the substance in question was heroin. The second was testimony by a Commonwealth official that there was no record that the defendant had authorization to sell narcotics.

on the basis of what the court knew at the time it ruled on this matter and cannot be validated by subsequent events.

The principle may be conceded but it does not aid this defendant. Here the trial was scheduled to begin at 9 a.m. on October 5 but in fact did not begin until 8 p.m. on the 6th. When the defendant did not appear on the 5th, the court did not immediately jump to conclusions despite the fact that this was the third missing defendant that week in a related series of cases and, indeed, involving the same attorneys.[6] Instead, it waited, on the theory that the dedenfant like Attorney Andreu might have misunderstood the assigned time. Even then, after several additional delays, the court made no final decision to go ahead with the trial until it learned that the investigative authorities had concluded that the defendant had fled the jurisdiction and until a marshal and Attorney Andreu reported a conversation in which defendant had said he would absent himself.[7]

This conversation provides an aspect of defendant's next contention, that he did not receive effective representation by counsel of his choice. Assuming that Attorney Andreu heard the defendant say he was about to flee, it is

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[6] In defendant's brief it is laconically conceded that "[i]t is reasonable to assume that Goitia fled the jurisdiction subsequent to trial."

[7] Defendant stresses that on the morning of October 6, in the proceedings in a related case, the court indicated that it would proceed as soon as possible with the Goitia case, because the defendant had voluntarily absented himself. Without for a moment intimating that that court was not justified in making such a declaration on the basis of its knowledge at that point, we note that the decision to go forward with the trial was not final until the court had completed its painstaking inquiry on the evening of the trial itself.

contended he would be a potential witness against the defendant in a future trial for bail jumping and this would present an irreconcilable conflict of interest. This proposition is not supported by citation of authority and in our opinion is inaccurate. The term "conflict of interest" bespeaks a situation in which regard for one duty tends to lead to disregard of another. The obvious example of this is representation of clients with incompatible interests.[8] The courts have not been slow to correct such abuses. *Glasser* v. *United States,* 315 U.S. 60, 76 (1942); see *Rolon Marxuach* v. *United States,* 398 F.2d 548 (1st Cir.), *cert. denied,* 393 U.S. 982 (1968). While conflicts of many types can be imagined, see generally Annot. 17 A.L.R.3rd 835 (1968), it is difficult to see how the situation here presents a conflict of any sort.

Technical conflict of interest apart, defendant next asserts that his relations with Attorney Andreu had deteriorated to such an extent that the attorney-client relationship had ceased to exist and indeed that at the trial no defense worthy of the name was presented.[9] We note first that lack of rapport between attorney and client does not automatically mean that there has been inadequate repre-

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[8] See ABA Canons of Professional Ethics No. 6: "Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

[9] It is even suggested that defendant dismissed Attorney Andreu. But the defendant never informed the court of such a desire and in any event the right to choice of counsel may not be allowed to lead to the disruption of court proceedings. *Bostick* v. *United States,* 400 F.2d 449 (5th Cir. 1968); *Dearinger* v. *United States,* 344 F.2d 309 (9th Cir. 1965); see also *United States* v. *Crespo,* 398 F.2d 802 (2d Cir. 1968).

sentation. *Lamoureux v. Mass.*, No. 7200 (1st Cir. March 20, 1969). Further, Attorney Andreu was thoroughly competent to try the case, as we have already determined in the similar case of *Rolon Marxuach, supra,* at 551. Nor did he lack zeal, although this was best demonstrated in matters that tended to delay the trial. If at the actual trial counsel were inactive there is reason to believe that defendant himself concurred in this strategy, as evidenced by his conduct during the selection of jurors. We will not assume that a defendant who voluntarily absents himself from the trial is greatly concerned with presenting an energetic defense.

In voluntarily absenting himself from the trial we think this defendant lost his opportunity to change counsel if this is what he wished and repudiated his right to appear and be confronted by witnesses. To hold otherwise would allow him to make a mockery of the judicial process at his own whim.

Of the objections raised to the presentation of the government's case we need discuss but one. In its closing argument the prosecution made several references which could be interpreted as comments on the defendant's failure to testify.

> "You have heard the testimony of the Government, the only evidence before you.
>
> "Fortunato Jorge has proved the case beyond a reasonable doubt. I don't think I should argue any more. There should be no doubt as to the Government's having proved beyond a reasonable doubt the three counts. Ricardo Perez Goitia, according to the testimony, had in his possession the narcotic drug, Ricardo

> Perez Goitia sold the narcotic drug to the special employee. There is no other testimony to the contrary. The only evidence you have is the testimony of Fortunato Jorge, which has not been impeached or cross-examined by the attorney for the defense."

Although part of this was quite improper, we do not think it is grounds for reversal in this case. In the first place there was no objection to these remarks. *Compare Holden* v. *United States,* 388 F.2d 240 (1st Cir. 1968), *cert. denied,* 393 U.S. 864, *with Desmond* v. *United States,* 345 F.2d 225 (1st Cir. 1965). Second, the reference to "impeached or cross-examined by the attorney for the defense" tended to focus attention—legitimately—on the absence of impeachment by cross-examination rather than on contradiction by some other witness. *Cf. Holden* v. *United States,* 393 F.2d 276 (1st Cir. 1968). Finally, the court instructed the jury in clear language that

> "[t]he fact that the defendant has not testified in this case must not be considered or given any consideration by you whatsoever in your appraisal of the evidence presented to you. This is totally improper and should not be discussed or considered, because it is a constitutional right which everyone has not to testify in his own case."

We recognize that admonitory instructions may be ineffective. *Bruton* v. *United States,* 391 U.S. 123 (1968). But *Bruton* was concerned with an instruction to a jury to consider a confession against one codefendant but not against another, although it implicated both. This was a call to a sort of intellectual and moral heroism. Much of

the discussion of authorities in *Bruton* presupposed such a context. See *Jackson* v. *Denno,* 378 U.S. 368, 388-89 (1964). In the instant case, however, a jury that is able and willing to disregard defendant's failure to testify in the first place—and a defendant has to run this risk in any event [10]—is likely to be equally capable of ignoring prosecution comments which, after all, were not of an aggravated sort. The truly aggravating feature in this case is that the jury was aware that defendant was not even present. But for this the defendant had only himself to blame. Even this the court cured as best it could by appropriate instruction to the jury.

Affirmed.

[10] Compare *Bruton, supra,* at 131 where it is pointed out that the problem in that case could have been solved by severance. See Fed. R. Crim. P. 14.

APPENDIX B

Constitutional Provisions

AMENDMENT 5, UNITED STATES CONSTITUTION.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT 6, UNITED STATES CONSTITUTION.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.